

**“The Nuts & Bolts of Environmental Auditing and Disclosing
Noncompliance under EPA’s Voluntary Disclosure Policy”
Presentation by Bertram C. Frey, Deputy Regional Counsel
U.S. EPA, Region 5, Chicago, Illinois
Chicago Bar Association
February 16, 2000**

TEXT OF OVERHEAD SLIDES

EPA Audit Policy

Signed December 18, 1995

Purpose of the Audit Policy

The Audit Policy is designed to enhance the protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of federal environmental requirements.

Incentives for Self-Policing and Auditing

- < Elimination of gravity based penalties.
- < 75% reduction of gravity penalties without formal audit or management system.
- < No recommendations for criminal prosecution.
- < No routine requests for audits.

Under the Policy, which Penalties will be Eliminated?

- < Gravity based penalties, which reflect the seriousness of the violator’s behavior, will be eliminated.
- < Economic benefit, which protects competitors from being undercut by their noncomplying competitors, will not be eliminated.

Elimination of Gravity Based Penalties

- < When violations are found through: 1) environmental auditing or 2) a compliance monitoring program that meets EPA’s requirements, and are then voluntarily and promptly disclosed and corrected.

Environmental Audit

- < Environmental audit must be systematic, objective, documented and periodic.
- < These qualifications are defined under EPA’s 1986 Audit Policy.

Compliance Monitoring System Requirements : “Due Diligence”

- < Standards and procedures that outline how employees are to meet compliance.
- < Method for overseeing compliance.
- < Mechanisms to assure compliance, including monitoring and audits to detect and correct violations.

Compliance Monitoring System Requirements : “Due Diligence”

- < Efforts to communicate standards to employees and agents.
- < Incentives to managers and employees to comply with policies.
- < Procedures for prompt and appropriate correction of any violations and ability to prevent future violations.

75% Reduction in Gravity Based Penalty

- < 75% reduction in gravity-based penalty for a violation that is voluntarily discovered, promptly disclosed and expeditiously corrected, even if it was not found through an environmental audit or a compliance management system.

No Recommendation for Criminal Prosecution

- < EPA will not recommend a regulated entity for criminal prosecution if the conditions of the Audit Policy are met.

No Routine Requests for Audits

- < EPA will refrain from routine requests for audits if the conditions of the Audit Policy are met.
- < If the Agency has independent evidence of a violation, it may seek additional information.

Conditions that Must be Met to Receive full Policy Benefits

- < Systematic discovery through environmental audit or compliance monitoring system (“Due Diligence”)
- < Voluntary discovery.
- < Prompt disclosure.
- < Discovery and disclosure independent of Government or third party.

Additional Conditions

- < Correction and remediation.
- < Prevent recurrence.
- < No repeat violations.
- < Additional violations excluded.
- < Cooperation.

Other Violations Excluded

- < The violation is not one which: 1) resulted in serious harm, or may have presented an imminent and substantial endangerment to human health or the environment, or 2) violated the specific terms of any judicial or administrative order, or consent agreement.

Voluntary Discovery

- < Violation must be discovered voluntarily, not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial, or administrative order, or consent agreement.

Prompt Disclosure

- < Regulated entity must disclose a violation within 10 days after discovery of the violation.
- < Disclosure must be in writing to EPA.

Discovery and Disclosure Independent of Government of Third Party Plaintiff

- < Violation must be discovered and disclosed prior to any government investigation, citizen suit, filing of a third party complaint, report of violation by an employee not in authority, or imminent discovery of the violation by a regulatory agency.

Correction and Remediation

- < Regulated entity must correct violation within 60 days, certify in writing that the violations have been corrected and take measures to remedy any environmental or human harm.
- < If longer than 60 days, regulated entity must notify EPA in writing.
- < EPA may require legally binding agreement.

Prevent Recurrence

- < Regulated entity must agree in writing to take steps to prevent recurrence of violation.
- < May require improvements to environmental auditing or “due diligence”.

No Repeat Violations

- < Specific violation can not have occurred within the past three years at the same facility, or be part of a pattern of violations by the facility’s parent organization in the past five years.
- < Violation can not have previously received penalty mitigation from state or local agency.

Cooperation

- < Regulated entity must cooperate as requested by EPA and provide information as requested by EPA.

Opposition to Privilege

- < EPA remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits.

Effect on States

- < EPA consulted with states in developing the Audit Policy.
- < States can experiment with different approaches as long as the protection of public health or the environment is not jeopardized.
- < EPA reserves the right to bring independent action if state legislation does not cover these basic protections.

EPA Audit Policy Endorsed by State and Local Officials

- < Attorneys General or Environmental Commissioners from Alaska, Arizona, Connecticut, Florida, Iowa, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Nevada, Oklahoma, Tennessee, Washington, Wisconsin
- < National District Attorneys’ Association, representing nation’s local prosecutors.

< California and New York District Attorney's Association.

Companies Have Taken Advantage of EPA's Audit Policy

<approximately 670 companies have disclosed environmental violations at more than 2700 facilities.

<Approximately 270 companies have received penalty relief at 1300 facilities.

Updated 12/99

GTE Self-Disclosure 10/15/97

< EPA and GTE resolved 600 violations at 314 facilities in 21 states.

< Violations of EPCRA and SPCC plans under Clean Water Act include:

- 1) failure to notify state agency and local fire departments of sulfuric acid filled batteries; this information is necessary to protect firefighters and communities in the event of a chemical spill or release, and
- 2) failure to develop plans to mitigate diesel spills and keep hazardous chemicals out of the waterways.

< GTE followed the conditions of the audit policy and as a result \$2.38 million in potential penalties were waived.

National Industry-Wide Self Disclosure

<10 telecommunications companies disclosed and corrected 1,300 environmental violations at over 400 of their facilities under the Audit Policy.

<the 10 companies will pay a total of \$128,772 for their violations, which is equal to the amount the companies have saved for delayed compliance.

Region 5 Self Disclosure - East Ohio Gas (6/13/98)

<Through CACO, East Ohio Gas resolved 161 alleged violations of TSCA PCB regulations.

<As a result of prompt self-disclosure, a 100% gravity penalty reduction resulted (\$1,247,460 to \$193,260).

<\$193,260 represents the economic benefit to East Ohio Gas resulting from the violations.

Region 5 Self Disclosure - Mallinckrodt (11/4/98)

< Through CACO, resolved over 200 instances of improper branding and shipping of regulated pesticides, 7 instances of failure to notify EPA of adverse effects on domestic animals from its pesticides, and 13 instances of failing to maintain appropriate records for child resistant packaging.

<As a result of Mallinckrodt's timely and complete disclosure of most of these violations, the Consent Agreement represents a significant penalty reduction (\$808,000 to \$88,200).

States with Audit Policies

< CA, CT, DE, FL, MD, MA, NC, PA, TN, VT, WA, MN, NM, NY

State with Audit Rules

< OK

States with Audit Laws

< Privilege Only - AR, IN, IL, MS, OR

< Immunity Only - RI

< Privilege and Immunity - AL, CO, IO, KS, KY, MI, MN, MT, NE, NH, NV, OH, SC, SD
TX, UT, VA, WY

States that have Enacted Statutory Revisions and/or Issued Clarifying Attorney General's Opinion or Statement

< Privilege Only - IN (5/99), AR (3/99)

< Privilege and Immunity - MI (11/97), MN (5/99), MT(12/99), NH (5/99), OH (7/98), SD (3/96),
TX (5/97), UT (5/97), VA (7/95), WY (3/98),

< South Carolina and EPA have Reached an Understanding as to Necessary Statutory Revisions and
State has Issued Clarifying Attorney General's Statement, but No Revisions have so far been Enacted.

Proposed Revisions

< EPA has proposed various revisions to the 1995 Policy. The Agency based these changes on the
comments received to the survey and the preliminary findings of the effectiveness evaluation.

Comments relating to the proposed revision were due July 19, 1999. The revisions proposed would:

1. Broaden the period for "prompt disclosure" from 10 to 21 days and clarify the time of discovery.
2. State that the impending investigation or request for information must "involve the same facility" to fail under the "independent discovery" provision.
3. State that the "no recommendation for criminal prosecution" clause is available for entities that meet all of the conditions except for "Systematic Discovery."
4. Clarify what is meant by "cooperation" required for disclosures made under the 1995 Policy.
5. Clarify that penalty relief may be available for "good faith" under other enforcement policies for violation disclosures even if the entity does not meet the Audit Policy criteria.
6. Clarify the imminent and substantial endangerment exclusion.
7. Change "due diligence" to "compliance management system".
8. Describe EPA processes for handling civil and criminal disclosures.
9. Clarify that case information will be released by EPA upon settlement unless a claim of confidential business information is made, another Freedom of Information Act exemption applies, or any other law would preclude its release.
10. Clarify that violations found through the use of an audit or compliance management system performed as a requirement of participation in an Agency Partnership Program can be considered to have been voluntarily discovered.
11. Note the availability of Interpretive Guidance on issues concerning the availability and application of the Policy.
12. Clarify that if a facility discloses a violation of a state approved program or one that the State is authorized to administer or enforce, EPA will consult with the State in responding to the

disclosure.

Audit Policy Internet Resources

< EPA Headquarters, Office of Enforcement and Compliance Assistance's Site

<http://www.epa.gov/oeca/auditpol.html>

< EPA Region 5, Office of Regional Counsel's Site

<http://www.epa.gov/region5/orc/audits.htm>

< Other links are listed in the handout.

Audit Policy Internet Resources

<Audit Policy Support Documents

<http://www.epa.gov/oeca/auditpol.html>

<Audit Policy: Initiatives for Self Policing

<http://www.epa.gov/oeca/auditpol.html>

<Audit Policy Interpretive Guidance

<http://www.epa.gov/oeca/apolguid.html>

<'Audit Policy Update' (Newsletter)

<http://www.epa.gov/oeca/ore/auditupd.html>

<Confidentiality of Information Received Under Agency's Self-Disclosure Policy

<http://www.epa.gov/oeca/sahmemo.html>

<Memorandum-Subject: Implementation of the Environmental Protection Agency's Self-Policing Policy for Disclosures Involving Potential Criminal Violations

<http://www.epa.gov/oceft>

<Policy on Compliance Incentives for Small Businesses

<http://www.epa.gov/oeca/smbusi.html>

<Memorandum-Subject: Reduced Penalties for Self-Disclosures of Certain Clean Air Act Violations

<http://www.epa.gov/oeca/ore/caa-tit.pdf>

<Optional Form for Disclosure Submittal

<http://www.epa.gov/oeca/ore/checklist.pdf>

<Audit Policy Evaluation

<http://www.epa.gov/oecaoppa/ape.htm>

<'Enforcement Alert' (Newsletter)

<http://www.epa.gov/oeca/ore/enfalert>

<Y2K Enforcement Policy

<http://www.epa.gov/year2000>

<EPA Region 5 Office of Regional Counsel's Audit Policy Page with Several Links

<http://www.epa.gov/region5/orc/audits.htm>